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IN THE

Supreme Court of the United States

BAKER BOTTS L.L.P. AND JORDAN, HYDEN, WOMBLE, CULBRETH & HOLZER, P.C.,
Petitioners,

v.

ASARCO LLC,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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TABLE OF CONTENTS

	Page
Introduction	1
Argument	2
A. Baker Botts is not "adverse" to the estate for seeking Code-authorized non-diluted compensation	2
1. Sections 327(a) and 328(c) are inapplicable	3
2. Baker Botts was not "adverse" to the estate when it successfully defended its fee application	4
B. Meritorious defense of a fee application is a "service rendered" that benefits the estate and is necessary to the administration of the case	7
C. ASARCO cannot distinguish §330(a) and "fee-shifting statutes" to justify core-fee dilution only in bankruptcy	12
D. ASARCO's blanket ban on defense fees violates § 330's guarantee of parity with non-bankruptcy compensation	16
E. ASARCO's rule portends harmful results	21

TABLE OF AUTHORITIES

Page

CASES

Alyeska Pipeline Serv. Co. v. *Wilderness Soc'y*,
421 U.S. 240 (1975) 14, 15

Blanchard v. *Bergeron*,
489 U.S. 87 (1989) 15

Comm'r, INS v. *Jean*,
496 U.S. 154 (1990) 10, 12, 15

Gagne v. *Maher*,
594 F.2d 336 (2d Cir. 1979) 12, 16, 22

Gossett & Gossett, P.A. v. *Mervolion*,
941 So.2d 1207 (Fla. Dist. Ct. App. 2006) 19

Hall v. *Cole*,
412 U.S. 1 (1973) 23

Hardt v. *Reliance Standard Life Ins. Co.*,
560 U.S. 242 (2010) 13

In re Borders Grp.,
456 B.R. 195 (Bankr. S.D.N.Y. 2011) 7

In re Consolidated Bancshares, Inc.,
785 F.2d 1249 (5th Cir. 1986) 18

In re Crager,
691 F.3d 671 (5th Cir. 2012) 23

In re Smith,
317 F.3d 918 (9th Cir. 2002) 22

Lamie v. *U.S. Trustee*,
540 U.S. 526 (2004) 3, 24

Lee v. *Daniels & Daniels*,
264 S.W.3d 273 (Tex. App. 2008) 19

TABLE OF AUTHORITIES—Continued

Page

STATUTES

11 U.S.C. § 102(5) 8
11 U.S.C. § 104(a) 14
11 U.S.C. § 110(i) 14
11 U.S.C. § 327 3
11 U.S.C. § 327(a) 1, 2, 3, 4, 5, 6
11 U.S.C. § 328(c) 1, 3, 4
11 U.S.C. § 330 ..... 3, 16, 24
11 U.S.C. § 330(a) ..... *passim*
11 U.S.C. § 330(a)(1) 2, 11, 12, 18, 20
11 U.S.C. § 330(a)(1)(A) 10
11 U.S.C. § 330(a)(2) 10
11 U.S.C. § 330(a)(3) 11
11 U.S.C. § 330(a)(3)(B) 17
11 U.S.C. § 330(a)(3)(C) 8, 12
11 U.S.C. § 330(a)(3)(F) 17, 20
11 U.S.C. § 330(a)(4) 2
11 U.S.C. § 330(a)(4)(A) 8, 11, 12, 18
11 U.S.C. § 330(a)(4)(A)(ii) 7, 8, 9
11 U.S.C. § 330(a)(6) 11
11 U.S.C. § 331 4
11 U.S.C. § 350 ..... 6, 9
11 U.S.C. § 503(b)(2) 9
11 U.S.C. § 507(a)(2) 9
11 U.S.C. § 523(d) 14
11 U.S.C. § 641 14
11 U.S.C. § 642 14

TABLE OF AUTHORITIES—Continued

Page

11 U.S.C. § 643 14
11 U.S.C. § 644 14
11 U.S.C. § 704(a)(1) 6
11 U.S.C. § 704(a)(9) 6
11 U.S.C. § 1106(a)(7) 6
11 U.S.C. § 1129(a)(9) 9
11 U.S.C. § 1302(b) 6
11 U.S.C. § 1326(b)(1) 9
18 U.S.C. § 983(b)(3) 13
28 U.S.C. § 586 6
Tex. Civ. Prac. & Rem. Code § 38.001(8) (West 2014) 19

REGULATIONS AND RULES

78 Fed. Reg. 36,268 (June 17, 2013) 4
Fed. R. Bankr. P. 3022 6

LEGISLATIVE HISTORY

Certain Problems Associated with Evaluating and Monitoring the Fees Charged by Professionals Against Estates in Bankruptcy: Hearing Before the Subcomm. on Courts & Admin. Practice of the S. Comm. on the Judiciary, 102d Cong. (1992) 17, 18

OTHER AUTHORITIES

Bloomberg Law: Bankruptcy Treatise (2015) 3
Ch. 11 Trustee Handbook, Dep't of Justice (2004) 6

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REPLY FOR PETITIONERS

INTRODUCTION

Faced with nearly all courts and the entire bankruptcy community—former judges, leading professors (including Code drafters), trustees, practitioners, the U.S. Trustee, and even fee examiners (who exist to suppress fees)—advocating for discretion to award fees for successfully defending a fee application, ASARCO grasps at new arguments it never mentioned to the Fifth Circuit and that *no* reported case, including the opinion below, endorses. Bankruptcy counsel, ASARCO now argues, are "adverse" to the estate when they defend their fee applications, violating § 327(a) and § 328(c). Professionals, it claims, do not "assist the trustee" under § 327(a) when they defeat meritless objections. To ASARCO, de-

fending the fee application is not even a "service" under § 330(a)(1). And it argues that § 330(a)(4) prohibits compensation unless a task is both necessary to case administration and directly benefits the estate.

These new arguments all fail on their own terms, for they contravene text, legislative history, and common sense. Perhaps most telling, *every* argument ASARCO makes would equally prohibit compensation for *preparing* a fee application. But universal agreement (even from ASARCO) that preparing fee applications *is* compensable conclusively demonstrates that ASARCO misreads the statute. Both preparing and defending applications can "serv[e]" and "assist" the trustee in accurately determining the administrative expenses the estate owes. Both are equally necessary to case administration and beneficial to the estate, for both are prerequisites for creditors to be ultimately paid and the case closed. ASARCO's arguments cannot sustain the judgment below, and the Court should reverse.

ARGUMENT

A. Baker Botts is not "adverse" to the estate for seeking Code-authorized non-diluted compensation

ASARCO's brief keys on its contention that Baker Botts was "litigat[ing] against the bankruptcy estate" (Br. i (reformulated question presented)) and thus "adverse to the estate" under § 327(a), rendering its fee-defense non-compensable. ASARCO never made that argument until its Supreme Court merits brief for good reason: Baker Botts was not "litigating against the estate."[1] The estate—Baker Botts' client, ASARCO-the-debtor-in-possession—paid all of Baker Botts' core fees

[1] As best petitioners can tell, *no* court has ever used (and no party has ever pressed) this argument as a basis to deny defense fees, including the Fifth Circuit.

without objection. Pet. App. 57a. Baker Botts was instead responding to objections raised solely by Reorganized ASARCO, the new entity (now controlled by the fraudulent-transferor parent company) that emerged from bankruptcy when the plan was confirmed. In defeating these meritless objections, Baker Botts was assisting the estate in determining the proper amount of administrative expenses owed, not "litigat[ing] against the bankruptcy estate." ASARCO thus apparently means something far different when it accuses petitioners of "adversity": it would find adversity whenever the estate will pay professionals' fees for a given task. But that definition of adversity proves far too much and leads to absurd results.

1. *Sections 327(a) and 328(c) are inapplicable*

At the outset, § 327(a) and § 328(c) have no bearing on the compensability questions presented here. Section 327 ("Employment of professional persons") answers only the question of *whom* the trustee "may employ" ("attorneys * * * not * * * adverse to the estate * * * to assist the trustee in carrying out the trustee's duties"). It says nothing about the question here: *For what tasks* can persons so employed be compensated? Congress answered that question in § 330 ("Compensation of officers"), which is why both parties and the courts below have, until now, focused on § 330(a).[2]

Section 327(a)'s adverseness provision is simply a conflict-of-interest safeguard: it ensures the trustee does not hire an attorney who is "adverse to the estate," and it implicitly requires that the court remove an attorney if a conflict arises. See Bloomberg Law: Bankruptcy Trea-

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[2] Section 327(a) prohibits compensation only where professionals were not employed by the trustee. See *Lamie* v. *U.S. Trustee*, 540 U.S. 526, 529, 538-539 (2004). No one disputes that petitioners were employed by the trustee.

tise, pt. I, ch. 26, at III.B (2015). ("The[] [adverse-interest requirement] appl[ies] not just at the time of retention but also throughout the case * * * If an actual conflict of interest exists, disqualification is required * * * "). Section 328(c) complements § 327(a) by providing that courts "may deny" compensation if the professional labored under an undisclosed conflict. Notably, ASARCO never sought to disqualify Baker Botts as adverse under § 327(a) for defending its fee application, nor did ASARCO seek to disallow defense-fee compensation under § 328(c) because Baker Botts had "develop[ed] an 'interest adverse' to the estate," ASARCO Br. 15. Neither provision supports categorically denying defense-fee compensation.

Indeed, labeling as "adverse to the estate" professionals pressed to defend duly-earned fees creates absurd results. Professionals may seek interim compensation every 120 days with "notice and a hearing," and parties may file objections. § 331; 78 Fed. Reg. 36,248, 36,269 (June 17, 2013) (U.S. Trustee has "objected to thousands of interim fee applications"). Yet ASARCO's position would brand professionals "adverse to the estate" the moment they respond to interim-fee objections, requiring their immediate disqualification under § 327(a). That cannot be the law.

2. *Baker Botts was not "adverse" to the estate when it successfully defended its fee application*

To ASARCO, defending the fee application is improperly "adverse to the estate" because fee litigation "has the ultimate goal of *diminishing* the 'estate.'" Br. 27 (emphasis by ASARCO); *id.* at 11. From this premise, ASARCO insists that application-defense "'benefits' *only* the attorneys," *id.* at 27 (emphasis by ASARCO), does

not "assist the trustee[3] in carrying out [his] duties," § 327(a), and is therefore non-compensable.

Even if § 327(a) had any bearing on whether particular tasks performed by an estate professional are compensable, ASARCO's definition of adverseness crumbles under its own weight. It is more draconian than the rejected economy-of-the-estate approach. If defense fees are "*adverse to the estate that the trustee serves*" (ASARCO Br. 17 (emphasis by ASARCO)) simply because creditors would typically pay them, then the inexorable conclusion must be that bankruptcy professionals should work for free. *All* professional fees detract from the estate and (usually, but not here) creditors' recovery, thus becoming "adverse" under ASARCO's test.

Most tellingly, ASARCO's approach would denominate as "adverse" to the estate, and thus non-compensable, the preparation of fee applications. Preparing the application "has the ultimate goal of *diminishing* the estate," ASARCO Br. 27 (emphasis by ASARCO), in precisely the same way as defending the fee application; both are steps in the process of collecting core fees from the estate. Yet ASARCO admits that fee-application preparation *is* compensable. Br. 30. It follows that § 327(a) cannot prohibit compensation for successfully defending the fee application. While both steps benefit the professional by securing compensation, neither benefits *only* the professional.

Specifically, by warding off meritless objections, § 327(a) professionals "assist the trustee" in his statutory duty to oversee § 330(a) compensation and accurately settle the estate, just as they do in initially preparing applications. The trustee must *conclude* § 330(a) compen-

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[3] Like ASARCO (Br. 4 n.2), petitioners' references to "trustees" equally denote Chapter 11 debtors-in-possession.

sation disputes.[4] An estate with unresolved contested matters is not "fully administered" and should not be closed. See § 350; Fed. R. Bankr. P. 3022. Baker Botts' work pursued accurate settlement of the estate's business. Defending its fee application was necessary to establish that ASARCO's core-fee objections were wholly meritless (as the courts below held) and should thus be disregarded in wrapping up the case.

The very "trustees" that the statute references—Chapter 7 and 13 trustees who routinely employ professionals to assist them in administering bankruptcies—agree with petitioners. The national trustee organizations argue that attorneys *may* be compensated for successfully defending their fee applications. NABT Br. 2, 7-8; NACTT Br. 3-7. These *amici* are not "Beverly Hills [lawyers]" who "want more money," ASARCO Br. 57; they are officers of the court appointed by the U.S. Trustees to administer bankruptcies. See 28 U.S.C. § 586. If fee litigation were categorically adverse to trustees, or even no "assist[ance]" to them, no one would be more likely to spring to ASARCO's defense. Yet every trustee appearing as *amicus* supports Baker Botts.[5]

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[4] See, *e.g.*, § 704(a)(1), (9) (describing trustee's duty to "close [the] estate" and "file a final account of the administration of the estate"); § 1106(a)(7) (describing trustee's duties "after confirmation of a plan"); § 1302(b); Ch. 11 Trustee Handbook, Dep't of Justice (2004), at 68, 70, 76 (trustee must "actively supervise * * * reasonableness and necessity of [professional] fees and expenses" and "review" and "object" to "professional fee applications"); cf. NABT Br. 2, 5-6, 17-18; NACTT Br. 2.

[5] ASARCO argues (Br. 17-18) that an accountant retained by the estate could not be compensated for attorneys' fees it incurs defending its fee application because the attorney would not have been retained by the trustee under § 327(a). While that question is not presented here since Baker Botts was undisputedly employed under § 327(a), ASARCO's citation-free assertion is baseless. As with attorneys who must defend their own core-fee application, the statuto-

B. Meritorious defense of a fee application is a "service rendered" that benefits the estate and is necessary to the administration of the case

Flowing from ASARCO's contention that defense of a fee application is "adverse" to the estate is its argument that fee-defense cannot be a "service" or "benefit" to the estate or even "necessary to the administration of the case." See § 330(a)(4)(A)(ii). This assertion fails for much the same reasons as ASARCO's adversity gambit.

1. ASARCO contends that successfully defending fee applications cannot be a "service rendered" because it is not performed "for others." Br. 16; accord U.S. Br. 31-34. By isolating "service rendered" from the rest of the statute, ASARCO misunderstands the nature of bankruptcy professionals' essential work to determine the estate's administrative expenses and close the case. Such work—which includes both preparing the fee application and defeating objections—provides a service to the estate in accurately determining the amount that remains to be distributed to creditors, enabling the court to close the case. Successfully defending the application is thus performed "for others" just as much as initially preparing it, which all agree is compensable.[6]

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ry grant of "reasonable compensation" and "necessary expenses" to professionals necessarily includes discretion to award legal costs incurred defending the core-fee application. Courts have frequently so held. *In re Borders Grp.*, 456 B.R. 195, 203-209 (Bankr. S.D.N.Y. 2011) (surveying case law).

[6] ASARCO analogizes the fee application to a mechanic's preparation of a bill for his work, characterizing both as a final "service rendered," distinguishable from subsequent "adversarial" disputes over the bill. Br. 31. But the analogy quickly breaks down: a mechanic could hardly expect a customer to cheerfully pay for this invoicing "service," whereas preparing a detailed fee application for court review is compensable. That is because case-administration "services" in bankruptcy are simply different animals from typical bilateral

The text confirms that a "service rendered" need not directly enhance the estate to be compensable. Indeed, courts must consider whether "*the services* were necessary to the administration of, or beneficial at the time at which the *service was rendered* toward the completion of, *a case*." § 330(a)(3)(C) (emphasis added); accord § 330(a)(4)(A) (prohibiting compensation unless "service" was "necessary to the administration of the case" or likely to benefit estate). Congress recognized that case-administration and case-completion services are compensable even if not performed directly on the estate's behalf.

2. ASARCO next misreads § 330(a)(4)(A)(ii) by contending that a service must satisfy *both* prongs to be compensable. The plain text refutes that, as even the Fifth Circuit recognized. Pet. App. 15a; see also Texas Br. 5-16 (linguistic analysis); U.S. Br. 6 (endorsing petitioners' disjunctive reading). ASARCO's understanding would make "and" and "or" wholly interchangeable, with *no* difference in textual meaning. After the statutory double negative ("the court shall *not* allow compensation for * * * services that were *not*"), the use of "or" permits an election, whereas the use of "and" would require satisfaction of both. ASARCO's reading violates the Code's rules of construction, which provide that "'or' is not exclusive," § 102(5); thus, "if a party 'may do (a) or (b),' then the party may do either or both." 11 U.S.C. § 102 hist. n. Legislative history eliminates any remaining doubt, as Congress added the case-administration prong in 1994 to *loosen*, not restrict, compensation by replacing the initial Senate version that required a benefit to the estate. Pet.

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commercial relationships: such services—including both application-preparation and fee-defense—are not performed directly for a client, but are instead performed to accurately determine administrative expenses and enable closing of the case.

Br. 37-38. ASARCO ignores this powerful legislative history throughout its brief.

3. Even if fee-application defense *were* required to satisfy both § 330(a)(4)(A)(ii) conditions, ASARCO would still lose. As the district court found, "Baker Botts' actions resolving outstanding fee issues clearly benefits the estate," for "the bankruptcy case cannot be put to bed until these matters are resolved." Pet. App. 47a. ASARCO ignores, rather than answers, the mountain of authority supporting Baker Botts' showing that successfully defending the fee application is necessary to accurately determine the estate's administrative expenses, which is in turn necessary for final payment to creditors. Pet. Br. 25-26 (collecting cases and citing §§ 503(b)(2), 507(a)(2)); see also § 350 (case must be "fully administered" before closing); § 1129(a)(9) (plan must provide for full payment of administrative expenses to be confirmed); § 1326(b)(1) (administrative expenses must be paid before creditors). Resolving fee disputes is thus literally "necessary" to closing the case *and* to enabling the estate to finally pay its administrative expenses and its creditors—which certainly qualifies as a "benefit."

4.a. ASARCO's argument again founders on its inability to materially distinguish fee-application preparation from fee-application defense. If (as ASARCO claims) a compensable activity must satisfy both § 330(a)(4)(A)(ii) prongs, then ASARCO's admission that preparation is compensable proves that preparation is *both* beneficial *and* necessary. Because defense and preparation are successive steps along the same case-closing path, both must be beneficial and necessary. ASARCO's contention that defending fee applications is not compensable because it does not "benefit" the estate to learn how much it owes professionals, Br. 27-28, is therefore internally incoherent. That determination is also the *raison d'être* of preparing fee applications, which ASARCO concedes

does benefit the estate.

b. ASARCO's next attempt fares no better:

> Fee-application preparation is 'necessary' for the straightforward reason that *the bankruptcy rules require it* * * * for professionals to be compensated. But petitioners cannot plausibly contend that fee *litigation* is needed to close the case * * *

Br. 28 (all emphases by ASARCO; citations omitted). To the contrary, the statute mandates "notice to the parties in interest and a hearing" to determine compensation and allows the "court on its own motion" or acting "on the motion of the United States Trustee * * * or any other party in interest" to award less than the requested compensation. § 330(a)(1)(A), (a)(2). The statute thus equally "require[s]" a fee application *and* fee litigation before professionals can be compensated and the case closed. Moreover, as the statutes cited, *supra* at 9, indicate, fees must be *determined*—not merely applied for—before creditors are ultimately paid. Thus, Baker Botts did not merely "feel" it was necessary "to pursue fees," ASARCO Br. 28; it was "forced to respond" to ASARCO's objections if it wished to recover core fees and if the estate was to have an accurate resolution of its debts. Pet. App. 142a.

ASARCO's objections were certainly of no benefit to the estate, but once ASARCO chose to lodge them, the Code and rules required that they be answered. ASARCO cannot throw a wrench in the works and then complain that Baker Botts had to expend resources to fix it. Petitioners could no more default on the "hearing" required by § 330(a) or responding to the "motions" it contemplates than they could default on the application itself. See *Comm'r, INS* v. *Jean*, 496 U.S. 154, 161-162 (1990) (requiring courts determining fees to "treat[] a case as an inclusive whole, rather than as atomized line-

items," and finding "no textual or logical argument for treating so differently a party's preparation of a fee application and its ensuing efforts to support that same application").

c. Finally, ASARCO attempts to defend its illogical position by noting that § 330(a)(6) expressly mentions fee-application preparation but not fee-application defense. Br. 30 & n.13. But ASARCO correctly acknowledges that authority for compensating fee applications or any other service must come from § 330(a)(1). Br. 12, 34-35. Section 330(a)(6) merely provides a metric for compensation, and even ASARCO cannot claim that § 330(a)(6) *is itself* authority for such compensation. Given that admission, Congress's acknowledgement of fee-application compensation—for the purpose of *limiting* it—cannot possibly establish that it is categorically different from fee-defense work when it comes to compensability *vel non*.

5. While ASARCO assigns "dispositive" weight to § 330(a)(6)'s non-authorizing language (Br. 30), it chides Baker Botts for invoking the mandatory § 330(a)(3) "factors" courts "shall" consider in determining "the amount of reasonable compensation to be awarded." Contrary to ASARCO's pretensions (Br. 34-35), Baker Botts never argued that the § 330(a)(3) factors independently authorize compensation for particular services. Nor are the § 330(a)(3) factors alone in reflecting Congress's mandate to compensate tasks that are necessary to "case" (not just "estate") administration; § 330(a)(4)(A) directly accomplishes that goal by permitting compensation for § 330(a)(1) services that are *either* beneficial to the estate *or* necessary to case administration. Pet. Br. 37-38.

The § 330(a)(3) factors are important because they illuminate the values Congress requires judges to pursue while exercising their broad discretion to ensure reasonable compensation. This guidance about how to deter-

mine the "amount" of compensation necessarily illuminates which work is compensable, subject only to § 330(a)(4)(A)'s prohibitions. Rather than confronting § 330(a)(3)(C)'s salient emphasis on compensating tasks "beneficial * * * toward the completion of [the] case," ASARCO avoids it by re-urging its misinterpretation of § 330(a)(4)(A)'s prohibition. Br. 36.

C. ASARCO cannot distinguish § 330(a) and "fee-shifting statutes" to justify core-fee dilution only in bankruptcy

1. Baker Botts agrees with the Government that defense fees would be allowed to ensure reasonable compensation for core work *even if* fee-application defenses were not independently compensable "services" under § 330(a)(1). U.S. Br. 25. "Denying attorneys' fees for time spent in obtaining them would dilute the value of a fees award by forcing attorneys into extensive, uncompensated litigation in order to gain any fees." *Jean*, 496 U.S. at 162 (quoting *Gagne* v. *Maher*, 594 F.2d 336, 344 (2d Cir. 1979)). Courts do not rely on any specific textual authorization to award *defense fees* under the various fee statutes. See ASARCO Br. 41 n.17 (conceding that no statutory fee provision "authorize[s] fees-on-fees *by name*") (emphasis by ASARCO). But that of course does not mean that the unanimous *Jean* Court (and myriad others) have created an impermissible "judicial exception" to the American Rule for defense fees.[7] Rather, courts award defense fees to ensure that attorneys are paid "reasonable compensation" for the *core work* everyone agrees is compensable. See Pet. Br. 40-46.

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[7] In repeatedly accusing the Government of seeking a "judicial exception" from the American Rule, ASARCO takes the quoted phrase from the U.S. Trustee Guidelines out of context. Br. 22, 24. The Trustee simply recognized that courts had allowed defense-fee awards, not that such awards were unmoored from statutory text.

Here, no one disputes that petitioners' work representing the estate for five years constituted "services rendered" that merited full compensation. The question is whether ASARCO may unilaterally dilute those core fees through meritless objections. ASARCO fails to show why the anti-dilution rationale for defense fees that consistently applies under other statutes is uniquely inapplicable in bankruptcy, where dilution is *especially disfavored*, see *infra* Part D.

2. ASARCO spills much ink to identify textual differences between § 330(a) and some "fee-shifting" statutes (which vary widely themselves). For example, ASARCO notes that § 330(a) does not use magic words like "prevailing party" or "reasonable attorney's fees." Br. 39-42. But ASARCO points to no case or logical principle showing why these textual phrases are essential to creating a fee-recovery regime or displacing the American Rule, much less why they uniquely trigger the availability of defense fees to avoid core-fee dilution.

To the contrary, fees are limited by the *presence*, not the *absence*, of a "prevailing party" requirement; some fee-shifting statutes omit it. See, *e.g.*, *Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U.S. 242, 254 (2010) (by using standards "less stringent [than] the traditional prevailing party standard, Congress * * * *expand[s]* the class of parties eligible for fee awards") (emphasis added; internal citations and quotations omitted). Nor is there any requirement that fee statutes use the term "attorney's fees," and indeed some do not. See, *e.g.*, 18 U.S.C. § 983(b)(3). That illustrates another weakness in ASARCO's case, for § 330(a) allows courts to award "compensation" to "professionals" rather than "reasonable attorney's fees" to a "prevailing *party*." This broader scope makes bankruptcy professionals' compensation *more* dependable under § 330(a)—consistent with congressional objectives—than under the alternatives that

ASARCO identifies.[8]

3. ASARCO ignores this Court's *direct statement* in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 260 n.33 (1975), that even the old Bankruptcy Act displaced the American Rule. The cited sections of the Act did not contain the "prevailing party" language that ASARCO deems essential to displace the American Rule. See 11 U.S.C. §§ 104(a), 641-644 (1970). For example, much like § 330(a) today, § 641 provided for "reasonable compensation for services rendered." ASARCO thus finds itself directly at odds with this Court. Its only mention of *Alyeska*'s statement (Br. 21 n.7) seeks to blunt its impact by invoking *Alyeska*'s observation of considerable variation among statutes that displace the American Rule. See 421 U.S. at 260. Agreed—§ 330(a) does not operate precisely like other statutes. But that does not help ASARCO. *Alyeska*'s point was that, despite internal differences, widely varying statutes *share* the feature that matters here: By creating an alternative fee structure, *they displace the American Rule.*

4. ASARCO finally argues (Br. 42) that bankruptcy is distinguishable from fee-shifting schemes because bankruptcy is not "adversarial" like other litigation aimed at "vindicat[ing] * * * constitutional or statutory rights." But no case or principle identifies adversariness as the *sine qua non* for displacing the American Rule or vindicating federal rights. Indeed, this Court included the Bankruptcy Act in its list of statutes that allow attorney fees in the name of "granting or protecting various

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[8] Noting two bankruptcy statutes that shift fees to prevailing parties, ASARCO infers that Congress did not intend defense-fee recovery in § 330(a). Br. 41 (citing 11 U.S.C. §§ 110(i), 523(d)). But neither statute shifts fees to estate-retained attorneys, prohibiting any inference about whether § 330(a)'s broad grant of "reasonable compensation" may include defense fees.

federal rights." *Alyeska*, 421 U.S. at 260 & n.33. A bankruptcy professional's work is sometimes adversarial (fraudulent-transfer litigation, fee disputes) and sometimes not, but Congress fully compensated all "services rendered." There is no reason to think Congress would desire dilution of a bankruptcy professional's core compensation simply because some of the underlying work was not adversarial.

5. For all of these reasons, ASARCO's assertion that § 330(a) is not a "fee-shifting" statute—in the sense that fees are not shifted to the losing party in an adversary proceeding—is irrelevant to whether § 330(a) displaces the American Rule and permits defense-fee awards to avert core-fee dilution.[9] Baker Botts has consistently acknowledged that § 330(a) is not a "prevailing party" or traditional "fee shifting" statute. See ASARCO Br. 43-44 (citing petitioners' arguments to this effect below). The key point is that § 330(a) is *analogous* to fee-shifting statutes in the respects relevant to determining the question here. Both regimes require courts to independently assess the reasonableness of fees, both allow non-clients to object to fees, and, consequently, both guard against diluting fees for core work in order to attract competent counsel and protect federal rights.[10]

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[9] Even if this were the test, ASARCO's fee attack here was certainly adversarial and resulted in a fee-shifting award, because the losing objector rather than the fully-paid creditors must cover Baker Botts' defense fees.

[10] ASARCO argues that in fee-shifting statutes "concerns about dilution are apt because an attorney for a non-prevailing plaintiff may receive no compensation at all." Br. 42. But fee-shifting statutes award fees regardless whether the attorneys would otherwise be paid by their clients, *Blanchard* v. *Bergeron*, 489 U.S. 87, 94 (1989), and in contexts where litigants are not necessarily penurious, such as the Patent Act. Thus, this Court has framed the dilution concern in terms of avoiding dilution for *compensable core work*. *Jean*, 496 U.S.

ASARCO rightly perceived this "big picture" in its briefing below: "Section 330 and the federal fee-shifting statutes share a common goal of determining 'reasonable' compensation to attorneys. Both have the policy objective of attracting competent counsel by ensuring compensation commensurate with what is available in other cases." Sealed C.A. Rec. 30. ASARCO now tries to limit these statements to whether fee enhancements are available under § 330(a). Br. 44 n.19. But it was more candid below: "Bankruptcy courts routinely look to non-bankruptcy federal fee-shifting cases for guidance in assessing the *reasonableness* of fee applications, *regardless of whether a fee enhancement is sought.*" Sealed C.A. Rec. 27 (emphasis added). ASARCO's statement is unassailably correct in the context of the question presented now. Numerous courts have awarded defense fees to safeguard "reasonable compensation" under § 330(a) by relying on the anti-dilution rationale first stated in fee-shifting cases. See Pet. App. G (collecting cases). That concern is even more acute in bankruptcy due to the unique procedural burdens of seeking and defending bankruptcy fees that are not present in fee-shifting cases, including a more detailed application and review by more potential objectors, including the U.S. Trustee.

D. ASARCO's blanket ban on defense fees violates § 330's guarantee of parity with non-bankruptcy compensation

In ASARCO's revisionist telling, Congress was insensitive to the risk of fee dilution that inheres in bankruptcy's detailed fee-application and litigation process. Indeed, ASARCO asserts that dilution from defense-fee denial is no different from what happens outside bankruptcy. Its arguments lack merit.

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at 162 (quoting *Gagne*, 594 F.2d at 344). That same concern exists in bankruptcy.

1. ASARCO asserts that "Congress's main focus was *rate* parity." Br. 50 (emphasis by ASARCO). ASARCO takes the illogical position that Congress *stopped* at the "sticker price" for rates. The text defeats that view. The parity factor examines not *rates*, but "customary *compensation* charged by comparably skilled practitioners." § 330(a)(3)(F) (emphasis added). Congress was concerned with the practitioner's *entire* "compensation," not merely initial "rates." Another factor in the same subsection—§ 330(a)(3)(B)—*does* use the word "rates," showing that Congress chose not to adopt ASARCO's parsimonious parity standard.

ASARCO offers no reason to believe Congress would be concerned enough about parity to insist on comparable rates—yet so indifferent to parity as to lack interest in whether bankruptcy practice's unique features would inevitably dilute what started out as nominally equal compensation. Indeed, Congress's decision to compensate application-preparation refutes this view.

2. ASARCO badly misreads the record in invoking Senator Metzenbaum's comments as a basis for rejecting bankruptcy-court discretion here. Br. 51-52. Senator Metzenbaum opposed paying bankruptcy lawyers for anything related to securing fees. Allowing "[p]rofessionals [to] charge hefty fees just for preparing their bills," he declared, was "an absurdity." "Think about it. In any other area, do people charge for preparing their bills?"[11]

This revealed Senator Metzenbaum's misunderstanding of the nature of bankruptcy fee applications. His analogy of paying for preparation of a "plumber's" bill, and his statement that "when [he] practiced law, the av-

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[11] Certain Problems Associated with Evaluating and Monitoring the Fees Charged by Professionals Against Estates in Bankruptcy: Hearing Before the Subcomm. on Courts & Admin. Practice of the S. Comm. on the Judiciary, 102d Cong. 3 (1992) ("Professional Fees").

erage bill in [his] office was prepared by one of the secretaries,"[12] demonstrated as much. But he was soon disabused, as witnesses, and eventually Senate colleagues, explained that bankruptcy practice is far more burdensome. Congress rejected Senator Metzenbaum's views by compensating fee-application preparation as a necessary case-administration service under § 330(a)(1) and (a)(4)(A), the same provisions that permit fee awards for defending applications. And Congress repeatedly amended Senator Metzenbaum's initial draft, modifying provisions requiring services to "benefit the debtor's estate" to allow compensation for case-administration services. Pet. Br. 36-38. ASARCO and the Fifth Circuit have now dredged up the Metzenbaum approach in an effort to achieve by judicial fiat what Congress refused to enact.[13]

3.a. ASARCO's argument largely depends on its view that securing fees in bankruptcy is no different from securing fees from non-bankruptcy clients, where the American Rule applies. Br. 45-50. Petitioners will not re-till this ground: bankruptcy fees are *inherently* more burdensome to recover. Pet. Br. 25, 27-30; NABT Br. 5-6. ASARCO compares the frequency of objections in bankruptcy—which often require full-dress litigation—to requests by non-bankruptcy clients for explanations or discounts. Br. 47. But it carefully avoids discussing how many non-bankruptcy client matters end up *in court* (a tiny fraction) versus how many bankruptcy fee applica-

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[12] Professional Fees, *supra*, at 111, 253-254.

[13] Indeed, Senator Metzenbaum quoted the "conspiracy of silence" alleged in *In re Consolidated Bancshares, Inc.*, 785 F.2d 1249, 1255 (5th Cir. 1986), as justification for denying fee-related compensation. Professional Fees, *supra*, at 3. Remarkably, the Fifth Circuit below quoted this same language, resurrecting Senator Metzenbaum's discarded rationale. Pet. App. 20a.

tions do (100%).

ASARCO tries to dodge the stunning lack of parity *in this case* by declaring that the "relevant question is what happens when a client refuses to pay." Br. 45. Not so: here, Baker Botts' *client*—ASARCO-the-debtor-in-possession—fully and willingly paid its bills. Pet. App. 57a. Outside bankruptcy, neither fee litigation nor court approval would have been necessary. With the client having fully paid, no third party (neither "insurer" nor "fee-auditing compan[y]," ASARCO Br. 45) could force Baker Botts into a time-consuming and dilutive dispute. But inside bankruptcy, Reorganized ASARCO—a non-client controlled by the fraudulent transferor—had a statutory right to object to Baker Botts' fees and force punishing litigation. Parity and non-dilution demand at least that bankruptcy courts retain *discretion* to compensate successful defenses where the client has paid the professional's core fees.

b. But even when the relevant comparison is a client who litigates over fees, ASARCO is still wrong about parity. It repeats the unsupported assertion that "[a] non-bankruptcy lawyer * * * who ends up in litigation with a client over fees does not then get to send the client a bill for the cost of that litigation." ASARCO Br. 13. To the contrary, if this litigation had involved a non-bankruptcy client who breached a contract of engagement (for instance, through non-payment of some or all of the fees due), Baker Botts could pursue a breach-of-contract action, *which entitles it automatically to attorney's fees.* See Tex. Civ. Prac. & Rem. Code §38.001(8); *Lee* v. *Daniels & Daniels*, 264 S.W.3d 273, 282 (Tex. App. 2008) (attorney "entitled to recover his attorney's fees" in suit to recover disputed fees from client). Nor is there any impediment outside bankruptcy to an engagement letter specifically providing for such fees. See, *e.g.*, *Gossett & Gossett, P.A.* v. *Mervolion*, 941 So.2d 1207, 1209 (Fla. Dist.

Ct. App. 2006) (enforcing retainer agreement obligating clients to pay attorney's fees incurred by law firm in "any legal action to collect fees incurred by the client"). But in bankruptcy, neither option is available; the professional must submit to the rigors of § 330(a) and the bankruptcy rules.

c. Seemingly accusing courts and the U.S. Trustee of lax enforcement, ASARCO opines (Br. 49, 52-54) that bankruptcy lawyers in Chapter 11 cases charge "premium" rates, and face less pushback from potential objectors than non-bankruptcy lawyers face from their clients. But see Pet. Br. 53-55; NACBA Br. 5-7, 16-17 (conspiracy of silence cannot exist in most consumer cases). Such assertions are best addressed through case-by-case vigilance with respect to core fees, not through a blanket ban on defense fees even in cases where ASARCO's assertions are demonstrably untrue. Here, all three lower courts found that Baker Botts' fee was 20% "below-market." Pet. App. 4a, 10a-11a. And Baker Botts' fees were vigorously tested by ASARCO's wide-ranging objections—far beyond those raised by non-bankruptcy clients.

If bankruptcy lawyers in fact seek premium rates through a "conspiracy of silence" in a given case, courts should correct that problem by independently enforcing § 330(a)(1)'s rule of "reasonable compensation" and § 330(a)(3)(F)'s comparability factor as applied to those core fees. To the extent Congress was concerned with some lawyers charging excessive core fees, nothing in the legislative history suggests that the answer is categorically denying defense fees to arbitrarily dilute premium, market, and below-market core fees alike, including the fees of lawyers who earn a few thousand dollars per case. Cf. NACBA Br. 12; NABT Br. 4.[14]

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[14] ASARCO even argues (Br. 48 n.20) that bankruptcy lawyers col-

E. ASARCO's rule portends harmful results

1. ASARCO ignores the perverse incentives its rule creates, while proclaiming that it "protects the interests of creditors and debtors." Br. 56. Yet not a single organization representing creditors or debtors joined ASARCO's cause. But organizations representing both creditors and debtors, as well as trustees and former judges, refute ASARCO's assessment. Nearly all courts agree that ASARCO's rule would generate meritless objections and wasteful satellite litigation, or force professionals to preemptively surrender their core fees commensurate with the fee-litigation costs threatened by blackmailing objectors. Pet. Br. 51-52. The prospect of exceedingly rare bad-faith sanctions will not deter even wholly worthless objections, as this case illustrates.

2. To bolster its argument that defense-fee compensation would incentivize professionals to excessively litigate fee applications, ASARCO presents its own version of the facts below. Br. 7-9, 57. But its creative rendering contravenes the bankruptcy and district courts' factual findings, which affirmed the reasonableness of Baker Botts' fee-defense costs and which ASARCO declined to appeal further. Pet. Br. 12-14. For example, ASARCO asserts (Br. 57) that Baker Botts charged over $400,000 for self-auditing its bills "even though their applications and task descriptions should have been correct initially." But the bankruptcy court specifically found that Baker Botts' initial application was correct and that "none" of the defense-fee award corresponded to "the recreation of initially inaccurate or insufficient time records." Pet.

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lect "premium" fees because they may be compensated for preparing fee applications. But this ignores that application compensation is necessary to reach parity precisely because fee applications are far more burdensome than client bills outside bankruptcy.

App. 149a-150a.[15] Courts' consistent exercise of discretion to deny fees to professionals who seek to make fee-defense work a "profit center" (ASARCO Br. 57), amply deters such behavior. *E.g.*, *In re Smith*, 317 F.3d 918, 928-929 (9th Cir. 2002) (courts properly deny defense fees where defense is "merit[less]" or "merely to get litigation fees").

3. Discretion also solves the charge that petitioners' interpretation of § 330(a) would allow compensation for *unsuccessful* defenses. See *Gagne*, 594 F.2d at 344 ("The exercise of discretion, however, gives the district judge great leeway. If the fee claims are exorbitant or the time devoted to presenting them is unnecessarily high, the judge may refuse further compensation or grant it sparingly."). ASARCO identifies no outbreak of improper awards—or even *one* such award. Courts have sensibly held that unsuccessful defenses are non-compensable. *E.g.*, *Smith*, 317 F.3d at 928-929. As a matter of discretion *and* statutory interpretation, it is hard to see how pursuing fees *for which one should not have applied in the first place* is "necessary" to case administration. See *ibid.*[16]

Discretion likewise answers ASARCO's oft-stated concern about "diminishing" an estate by awarding defense fees that substantially reduce recovery for unsecured creditors. As this Court observed in a comparable context involving the depletion of union funds needed for collective action, this consideration may be "an important

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[15] Most of the 191 timekeepers about which ASARCO complains expended a few hours to respond to ASARCO's "meritless [time-entry] objection" and demand for "every document" created during the bankruptcy. Pet. App. 150a, 3a; see C.A. Rec. 6847-6851.

[16] Similarly, the district court found that pursuing a fee enhancement was not "necessary" as a matter of law and therefore not compensable. Pet. App. 49a.

one," but "it is relevant, not to the *power* of federal courts to award counsel fees generally, but, rather, to the exercise of the District Court's discretion on a case-by-case basis." *Hall* v. *Cole*, 412 U.S. 1, 9 n.13 (1973) (emphasis added). Distrustful of Congress's reliance on discretion, ASARCO would categorically bar fees for *successful* defenses and when creditors are *not* adversely affected.[17]

4. Preferring to focus on large Chapter 11 bankruptcies with purported "premium" rates, ASARCO *does not dispute* the devastating effect its rule will have on millions of small and consumer bankruptcies with modest rates. *Amici* Chapter 7 and 13 trustees compellingly explain that professionals would commonly suffer crippling—even 100%—dilution under ASARCO's rule, deterring practitioners from taking these important cases. NACTT Br. 4-5; NABT Br. 6, 16-19; NACBA Br. 14-15. Even though these trustees frequently object to professional fees, and thus are "advantage[d] [by] the Fifth Circuit's holding" in a narrow sense, they "urg[e] reversal because of the broad impact the holding has on the overall system." NACTT Br. 5, 10.[18]

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[17] Discretion has been this case's central concept from literally the first page of Baker Botts' petition to the last page of its merits brief. Tellingly, ASARCO barely mentions it—the word "discretion" appears only four times (three in footnotes) in its nearly 15,000-word response brief. See Br. 9 n.5 (twice), 37 n.15, 54.

[18] ASARCO responds only in a footnote observing that some districts allow no-look fees that eliminate the need to file a fee *application* for the simplest Chapter 13 matters. Br. 55 n.22. But even in that narrow realm, no-look fees do not eliminate the dilution threat because parties-in-interest maintain their statutory right to mount *objections* to the no-look fee at the close of a case. See *In re Crager*, 691 F.3d 671, 676-677 (5th Cir. 2012) (holding that professional bears burden to justify no-look fee against objections because no-look arrangements do "not supplant the requirements of [§ 330(a)]"); NACBA Br. 12-14 (discussing dilution in context of no-look fees).

ASARCO irresponsibly dismisses the warnings of these independent and well-informed voices as mere "guesses." Br. 55. But it cannot dispute that "seeming order has attended" (*Lamie*, 540 U.S. at 537) the use of discretion to award defense fees for decades in the Ninth Circuit and the overwhelming majority of jurisdictions throughout the country. ASARCO gives no good reason to trade this well-functioning system for the perilous future predicted by the full spectrum of *amici*.

Respectfully submitted.

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